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No. 88-5319

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

DONALD R. LEGO,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Has petitioner preserved his argument for certiorari review?

2. Is the Illinois Supreme Court's decision in Zehr a state law rule or a constitutionally based rule to which the Griffith principles apply?

3. Even if Zehr is constitutionally based and entitled to retroactive application, was there any Zehr violation to correct on the facts of this case?

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RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

Respondent asks this Court to deny the petition for writ of certiorari to review the judgment of the Illinois Supreme Court.

OPINION BELOW

A copy of the opinion of the Illinois Supreme Court, cited as People v. Lego, 116 Ill.2d 323, 507 N.E.2d 800 (1987), was appended to the petition for writ of certiorari.

STATUTORY PROVISION INVOLVED

Illinois Supreme Court Rule 234, Ill. Rev. Stat. ch. 110A, sec. 234, 87 Ill. 2d R. 234 (1983) provides:

> Voir Dire Examination of Jurors
>
> The court shall conduct the voir dire examination of prospective jurors by putting to them questions it thinks appropriate touching their qualifications to serve as jurors in the case on trial. The court may permit the parties to submit additional questions to it for further inquiry if it thinks that they are appropriate, or may permit the parties themselves to supplement the examination by such direct inquiry as the court deems proper. Questions shall not directly or indirectly concern matters of law or instructions.

STATEMENT OF FACTS

In 1982, an intermediate Illinois appellate court held in People v. Zehr, 110 Ill.App.3d 458, 442 N.E.2d 581 (3rd Dist. 1984) that voir dire examination should include questions as to the understanding of the presumption of innocence.

In Lego's case, voir dire was conducted by the trial judge in March, 1984. Lego proposed that the judge ask each venireman "do you believe in the presumption of innocence as it applies to a person charged with a crime?" (R. 1094-1095). The judge declined to ask the question exactly as proposed and instead told the veniremen about the presumption of innocence and how it worked, (R. 1129-1131), and asked: do you have any bias or prejudice against a person simply because he is charged with a crime? (R. 1098, 1235, 1296); will you apply the law as the court states it to be, regardless of your personal feelings about it? (R. 1237, 1298); and if you are accepted as a juror, will you be fair and impartial? (R. 1237, 1298).

Lego was convicted and, while his direct appeal pended, the Illinois Supreme Court affirmed the appellate court decision in Zehr in September, 1984. People v. Zehr, 103 Ill.2d 472, 469 N.Ed.2d 1062 (1984). Then two years later, in People v. Britz, 112 Ill. 2d 314, 493 N.E.2d 575 (1986), the court declined to give Zehr retroactive application since it represented a change in Illinois law. Thereafter, this Court rendered its decision in Griffith v. Kentucky, 479 U.S. __ , 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), providing that new constitutional principles should be applied to cases pending on direct review.

On direct appeal, Lego claimed the trial court's refusal to ask his voir dire question as tendered was reversible error and an abuse of discretion. He based his claim on the Illinois Supreme Court's decision in Zehr.

In June 1987, the Court held that voir dire was conducted properly under the state rule which governed voir dire, Illinois Supreme Court Rule 234. Zehr was inapplicable because it was decided after Lego's trial and, as the Court held in

Britz, it had only prospective application where it "represented a change in Illinois law." Lego, 507 N.E.2d at 805. One justice dissented, stating that the court should have applied Zehr retroactively for the reasons set out in Griffith.

Lego picked up on the dissent position and, for the first time, argued that Griffith required the court to apply Zehr retroactively. Also for the first time, he claimed that the question he had tendered on the presumption of innocence had a constitutional basis in the right to the presumption of innocence as contemplated in In Re Winship, 397 U.S. 358 (1970) and the right to a fair and impartial jury as contemplated in Turner v. Louisianna, 379 U.S. 466 (1965).

Rehearing was denied June 5, 1987. But the court vacated its denial August 6, 1987, in light of an issue pending in other cases which could affect Lego's case, namely: whether the appellate court opinion in Zehr was controlling authority for trials within that district held after issuance of that opinion but before issuance of the Illinois Supreme Court's opinion.

After the court resolved that the appellate court's opinion was not controlling in such cases, it denied rehearing in this cause on June 27, 1988.

REASONS FOR DENYING THE WRIT

Because the Illinois Supreme Court has declined to give Zehr retroactivity, Lego now seeks to bring the Illinois retroactivity doctrine into conformity with Griffith v. Kentucky, 479 U.S.__, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). In Griffith, this Court removed the "clear break" exception for retroactivity for cases pending on direct appeal at the time a new constitutional rule is announced.

Lego's attempt to obtain this Court's review fails for three reasons: 1) he has not preserved the Griffith issue for certiorari review, 2) he does not present a substantial federal question since Griffith principles apply only to constitutional rules, not state court rules, and 3) he does not present an issue worthy of review since, even if Griffith applies, there was no Zehr violation on the facts of this case.

I. PETITIONER HAS NOT PRESERVED HIS ARGUMENT FOR CERTIORARI REVIEW.

Before the Illinois Supreme Court, Lego did not frame his claim as one of federal constitutional law. He did not claim that the jurors ultimately seated at his trial were impartial within the meaning of the fifth amendment, did not claim that he was prevented from exercising peremptory challenges, and did not claim a sixth or fourteenth amendment violation. Lego did not cite federal precedents to frame his argument and/or any cases employing a constitutional analysis. As a result, Lego's case was decided on state law grounds alone. Because there is an independent and adequate state law ground in this case, this Court should decline 28 U.S.C. § 1257 review. New York Transit Authority v. Beazer, 440 U.S. 568 (1979); Reserve Army v. Municipal Court, 331 U.S. 549 (1947).

Equally important, Lego merely alleged it was reversible trial court error to refuse the proposed voir dire questions. He did not make a timely Griffith claim in state court. Because petitioner did not seasonably advance his Griffith challenge in the state courts, certiorari review is

inappropriate. Cardinale v. Louisiana, 394 U.S. 437 (1969); Beck v. Washington, 369 U.S. 541, 552-53 (1962).

II. THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION BECAUSE ZEHR IS NOT A CONSTITUTIONALLY BASED RULE TO WHICH THE GRIFFITH PRINCIPLES APPLY.

Certiorari review is also inappropriate because no substantial federal question is presented in this case. In the Zehr decisions, the Illinois courts decided as a matter of state law that a trial judge commits an abuse of discretion if he refuses tendered voir dire questions on these topics. The Illinois courts did not purport or attempt to resolve a question of federal constitutional law. Thus, in Britz, the Court explicitly stated that "the holding in Zehr represented a change in Illinois law." People v. Britz, 112 Ill.2d 314, 319, 498 N.E.2d 575 (1986) (emphasis added); See also People v. Wilson, 98 Ill. Dec. 65, 493 N.E.2d 1086 (1986) and People v. Boswell, 94 Ill. Dec. 447, 488 N.E.2d 273 (1986) (where Illinois Supreme Court, in exercise of supervisory authority, reversed appellate courts which had given retroactive effect to Zehr).

There is no constitutional right to a peremptory challenge. Stilson v. United States, 250 U.S. 583, 586 (1919). Nor is there a constitutionally prescribed formula for voir dire examination. Compare Batson v. Kentucky, 476 U.S. 79 (1986) (racially discriminatory jury selection may deny equal protection of the law) and Turner v. Murray, 476 U.S. 28, 106 S. Ct. 1683, 1688 and n.10 (1986) (although sixth amendment violated in special circumstances involving a capital sentencing proceeding and an interracial murder, the Court declined to order trial judges to inquire regarding racial prejudice in every case).

In general, the sovereign states remain free to promulgate their own rules of criminal trial procedure. Illinois Supreme Court Rule 234 represents a valid manifestation of this exercise of state power. Cf. Spaziano v. Florida, 463 U.S.

447, 464 (1984) (there is no one right way to formulate a capital sentencing scheme). It permits the trial court judge, in the exercise of his discretion, to ask supplemental voir dire questions tendered by the parties. These questions "shall not directly or indirectly concern matters of law or instructions." Under this rule, the Illinois courts traditionally refuse supplemental questions of the very type proposed by Lego in this case. See People v. Lobb, 17 Ill. 2d 287, 161 N.E.2d 325 (1959); People v. Davis, 95 Ill. 2d 1, 447 N.E.2d 353, cert. denied, 464 U.S. 1001 (1983); Ill. Rev. Stat. ch. 110A, sec. 234 (Smith-Hurd 1983) Historical and Practice Note.

In a similar manner, the states may formulate their own substantive law of retroactivity. There is no federal constitutional right to retroactivity of a particular decision. Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U.S. 358, 364 (1932); Linkletter v. Walker, 381 U.S. 618, 629-29 (1965); Griffith, 107 S. Ct. at 712. Thus, the Illinois court has chosen to follow principles explained in Stovall v. Denno, 388 U.S. 293 (1967) when asked to confer retroactivity for a new state procedural rule. For example, in People v. Erickson, 117 Ill. 2d 271, 513 N.E.2d 367 (1986), the Illinois court applied the Stovall test to deny retroactivity for a new state law decision concerning pretrial waivers of sentencing juries. It said:

> [b]ecause Griffith addresses a rule which pertains to a constitutional right and the defendant herein seeks retroactive application of a rule which pertains to a statutory right, we do not deem Griffith controlling.

117 Ill. 2d at 280.

In sum, the Illinois Supreme Court was permitted to deny retroactivity to a new decision which modified established jury selection procedure. This Court should not grant certiorari review to formulate a common retroactivity theory for all the state states.

III. REVIEW IS INAPPROPRIATE BECAUSE, EVEN IF ZEHR IS CONSTITUTIONALLY BASED AND ENTITLED TO RETROACTIVE APPLICATION, THERE WAS NO ZEHR VIOLATION ON THE FACTS OF THIS CASE.

Finally, even if Zehr was constitutionally based and entitled to retroactive application, certiorari review is inappropriate because there was no Zehr violation on the facts of this case. The voir dire examination complied with the Zehr principles. It this Court were to intervene, it must still affirm the conviction and sentence.

Zehr said that the questions on the presumption of innocence "need not [be] asked in precisely the form submitted" so long as "the subject matter of questions [is] covered in the course of interrogation of voir dire." Zehr, 469 N.E.2d at 1064. The subject matter was convered in Lego's case when the judge told the venire pool that:

> under the law this defendant is presumed to be innocent of the charges against him, and that the presumption of innocence remains with him throughout the case, and during your deliberations on the verdict, until you have been convinced by the evidence in the case beyond a reasonable doubt of the guilt of the Defendant.
>
> Throughout the case, the burden of proving the guilt of the Defendant beyond a reasonable doubt is on the State. The law does not require that the Defendant prove his innocence.
>
> Your duties as jurors are to answer truthfully any questions which I put to you touching upon your qualifications to serve as jurors, and to state any matter which would tend to disqualify you as jurors.
>
> * * *
>
> It is your responsibility. You have an absolute duty as jurors to accept the law as the court states the law to be.
>
> * * *
>
> If you can't follow the law on the presumption of innocence or if you can't follow the law on the burden of proof, if you have personal objections to the law, then you can't serve as jurors.

(R. 1129-1130, 1131).

In addition, the judge asked each individual venireman the following questions: whether or not they have any bias or prejudice against a person simply because he is charged with a crime? (R. 1098, 1235, 1296); will you apply the law as the

court states it to be, regardless of your personal feelings about it? (R. 1237, 1298); and if you are accepted as a juror, will you be fair and impartial? (R. 1237, 1298).

This record demonstrates that: each juror knew about the presumption of innocence, each juror knew that he could serve if he had any objection to this presumption, each juror told the court he had no problem with any of these basic guarantees, and each juror assured the court that he had no bias against Lego simply because he was charged with the crime of murder. In this way, the voir dire successfully fulfilled Zehr's demand to get to the heart of any particular bias or prejudice which would deprive a defendant of his right to a fair and impartial jury.

This Court should not grant certiorari to establish a principle of retroactivity that will make no difference to the result of this case.

CONCLUSION

WHEREFORE, the People of the State of Illinois ask this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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